2001

Randy Smith v. Linda K. Jacobsen Smith : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE

STATE OF UTAH

RANDY SMITH,	/	
Plaintiff and Appellant,	/	
vs.	/	Case No. 14695
LINDA K. JACOBSON SMITH,	/	
Defendant and Respondent.	/	

BRIEF OF APPELLANT

Appeal from the Judgment of the
District Court of Weber County,
Honorable Calvin Gould, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE CITATIONS

UTAH STATUTES

IN THE SUPREME COURT OF THE

STATE OF UTAH

RANDY SMITH,	/	
Plaintiff and Appellant,	/	
vs.	/	Case No. 14695
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BRIEF OF APPELLANT

STATEMENT OF THE KIND OF CASE

A Petition was filed by the Respondent seeking to modify the Decree of Divorce, wherein the original Decree of Divorce granted custody of the minor children to the Appellant and seeks to have custody of the children given to the Respondent.

DISPOSITION IN LOWER COURT

Upon a hearing held in the Lower Court before a Judge who was not the Judge that had issued the original Decree of Divorce, the hearing Judge reversed the Order of the Court in the previous divorce hearing and granted custody of the minor children to the Respondent.

RELIEF SOUGHT ON APPEAL

The Appellant seeks reversal of the Order of the Lower Court granting custody of the minor children to the Appellant, which is contrary to the Order of the Court of original jurisdiction.

STATEMENT OF FACTS

The Appellant, who was the Plaintiff in the Lower Court, will be referred to in this Brief as "husband" and the Respondent, who was the Defendant in the Lower Court, will be referred to in this Brief as "wife".

A verified Complaint seeking a Decree of Divorce was filed by the husband on August 28, 1975, and a Consent and Waiver was signed by the wife on August 28, 1975. A Decree of Divorce was granted by the Honorable Ronald O. Hyde on September 9, 1975, making a division of the assets of the parties and granting custody of the two minor children to the husband, the matter being heard ex parte. (R-16)

On October 8, 1975, the wife filed an Affidavit to vacate Judgment (R-22) and also filed an Answer and Counterclaim to the Complaint therein seeking a different disposition of the assets of the marriage, as well as seeking custody of the minor children, which had previously been awarded in the Decree of Divorce by the Honorable Ronald O. Hyde to the

husband. (R-23-25). The Honorable Ronald O. Hyde denied the Motion to Set Aside Judgment on the Decree of Divorce and gave leave to file a Petition to Modify. (R-37)

On November 10, 1975, a Petition to Modify the final Decree of Divorce was filed by the wife alleging as a basis for the Decree of Modification, that the final Decree was oppressive and unfair and deprived the wife of her economic benefits and the custody of the two children. (R-31) The wife alleging as the basis for the modification, that she is newly remarried and more qualified to care for the two minor children (R-31) The additional provisions of the Petition seeking modification as to division of property is not material to the present appeal before this Court.

The two minor children are a female child named Kirsten, who is 7 years old being born November 5, 1968, and a male child, Ryan Smith, 2-1/2 years old, born June 13, 1973. (R-59)

The husband is also married to a Vickie Smith, who has two children, a son, Tracy, age 14, and a daughter, JoAnn, age 12, and who reside with the husband and two children, Kirsten and Ryan. A Home Evaluation was submitted by the Division of Family Services on March 12, 1976, to the Court, stating that the present wife of the husband was an "adequate

housekeeper as the home was clean and properly furnished". The general atmosphere of the home is one of warmth and comfort and the home is large enough to meet the family needs. (R-63) The social worker report further stating that Kirsten was doing well in school with her grades above average and that she was a good student with good attendance, well adjusted, a member of the L.D.S. Church and enjoys going to Church, with the child's social activities including skiing and bike riding and being involved in junior ski racing, and that the entire family engaging in joint activities with the children, the children seem willing to communicate with Mrs. Smith and all of them demonstrating a great deal of love and respect for both Mr. and Mrs. Smith. (R-63)

ARGUMENT

POINT I

MODIFICATION OF DIVORCE DECREE NECESSITATES SHOWING OF SUBSTANTIAL CHANGE OF CONDITIONS.

This Court held in Perkins v. Perkins, 522 P.2d 708, Supreme Court of Utah, May, 1974, that where a Decree of Divorce had been entered and where the party seeking a modification of a Decree of Divorce had not appealed from the original Decree and did not allege any changed conditions or circumstances in the Petition for Modification, that the Petition

for Modification was properly denied.

In Anderson v. Anderson, 13 Ut.2d 36, 368 P.2d 264, Supreme Court of Utah, January 18, 1962, wherein the Court held that the generalization of Title 30-3-5, Utah Code Annotated, as amended 1953, contemplates an opportunity for divorced litigants to come into Court for modification of the original Decree based on changed conditions and that any dissatisfaction with such Decree is a matter of appeal. Absent an appeal, it is not subject to modification except where such changed conditions are demonstrated (emphasis added by Court).

In the instant matter before this Court, the only basis for modification set forth by the wife in her Petition for Modification of the Decree (R-23,-25) was to the affect, that the wife had married in the interim period at the time that the Honorable Ronald O. Hyde had entered a final Decree of Divorce to the time of the hearing of the Petition before the Honorable Calvin Gould where the modification was sought being the basis of the wife's remarriage (R-31) and the allegation that there is a natural presumption that the mother should be granted custody of the children. This latter point will be discussed in a subsequent point, with no other basis being

given for the modification.

In Anderson v. Smith, 310 P.2d 783, Supreme Court of Idaho (May, 1957), the Supreme Court of Idaho held that a substantial change of circumstances and conditions, such that the welfare of the children requires a change in their custodian, must be shown before they can be taken from Appellant and their custody awarded to another.

The evidence before the Court in this matter and in the record presently before the Court shows that the husband is remarried (R-63) and that the wife has remarried, and that the husband having been granted the original custody of the children, has established a home which, in accordance with the report of the Department of Family Services (R-63), evidences that both the father and the present spouse of the father demonstrates a sincere concern for the children's well being; that they have been provided a stable home; that the children of the husband, as well as the two children of the husband's wife, Vickie, get along well together; that their activities are done together as a family; that the two minor children, Kirsten and Ryan, have adjusted well into their new living arrangement; that the husband is employed as a patrolman with the Ogden City Police Department, making $796.00 a month, and that the wife, Vickie, is presently making $500.00 a month;

that they are buying their home; that the home is adequate, having three bedrooms, a large kitchen, a frontroom, and a large family room, and that presently the garage is being made into a game room; that Vickie is an adequate housekeeper and the house is clean and properly furnished; that the general atmosphere of the home is one of warmth and comfort; there is a large fenced-in yard with a German Shepard and three pups; that both children were friendly and happy; that the oldest daughter, Kirsten, is doing well in school and is well adjusted; that the children attend church and enjoy going; that they enjoy social activities, including skiing and bike riding, and that the entire family engages together in activities; that the husband and Vickie show love and affection for all four of the children and that the two children, Kirsten and Ryan, demonstrate a great deal of respect and love for both of the parents (R-61,-63). The record further evidences that there is a complete Agreement and Stipulation filed with the Court as to visitation rights of the wife entered into March 22, 1976, as between the husband and the wife and their two attorneys providing for liberal and reasonable visitation rights and providing for a minimum disruption of the educational, social, and physical activities of the minor children so as not to be disruptive as to their activities, education, religious,

and social welfare (R-45,R-46), and that the husband and his wife, Vickie, have impressed upon the children that the wife is to be respected as the natural mother (R-201), and that nothing derogatory to the wife nor disparagement of the wife is allowed and the wife's new husband. (R-201)

In Rogich v. Rogich, 299 P.2d 91, Supreme Court of Idaho, the Court held:

> A Divorce Decree granting custody of the minor child to one of the parties may not be modified unless there has been a material, permanent, and substantial change in conditions and circumstances subsequent to entry of the original Decree which would indicate to the Court satisfaction that modification would be for the best interest of the child.

In Robinson v. Robinson, 15 Ut.2d 293, 391 P.2d 434, Supreme Court of Utah (Apr., 1964), the Lower Court had awarded custody of the minor children to the husband and this Court stated, that the welfare of the children is one of the primary concerns of the Court as was previously stated by the Court in Stiger v. Stiger, 4 Ut.2d 273, 293 P.2d 418, and the Court stated:

> Where the custody has been determined and the children appear to be comparatively well adjusted and happy, they should not be compelled to change their home unless there appears some substantial reason for doing so. Other circumstances being equal, this requirement would not be satisfied by the mere fact that economic circumstances may be better with the other spouse.

In Henrickson v. Henrickson, 358 P.2d 507, Supreme Court of Oregon (December, 1960), the Court stated that every prior child custody Order is res judicata and any later modification matter and some such elements of finality continues notwithstanding that the Order was ex parte (emphasis added).

The Oregon Supreme Court further stated that allowing modification because of a change in circumstances:

> Refers primarily to changes occurring since the rendition of the last custodial Order. In order to justify the modification for the care and support of the minor child, the Petitioner is under the burden to show that it would enhance the welfare of the child, or that the change in circumstances since the rendition of the last Decree has been such as injuriously affected the child.

It is submitted to this Honorable Court, that no such burden of proof has been established by the wife nor has any such circumstances been shown as was contemplated by this Court or by the Supreme Court of Oregon.

The wife testified on direct examination, that when she came to the office of Mr. Buckland, who was the attorney for the husband at the time that the divorce was stipulated to by the wife, that she drove to Salt Lake to come to the office of the attorney and that she was advised by the attorney for the husband, that she should have an attorney representing her (R-162), that the attorney went through

the documents, paragraph by paragraph, not only reading but explaining the contents therein (R-162), and that the terms of the verified Complaint had been discussed a week prior at the offices of the husband's attorney, and all of the elements of the divorce was discussed at that time (R-163); that the attorney for the husband advised the wife, that he represented the husband and that she was there on her own volition and that the wife so acknowledged (R-163), that the actual Consent was signed a week following the original explanation of the contents of the verified Complaint (R-163), the matter of the custody of the husband as to the two minor children was specifically and clearly set forth in the Complaint (R-1,-5).

Following the testimony of the wife on direct and redirect and cross-examination, the Court made inquiry of the wife and the following dialogue was had by the Court with the wife:

> THE COURT: So you think that you would have been at least 25 years of age at the time you signed the Appearance and Stipulation that led to the Decree in this case, is that correct?
>
> ANSWER BY WIFE: Ah huh.
>
> THE COURT: You indicated that at the time you -

in fact on the day that you in fact signed the papers in Mr. Buckland's office, that you went to Salt Lake City, you didn't intend to sign them, was that your testimony?

WIFE'S ANSWER: No, I didn't.

THE COURT: You did not?

WIFE'S ANSWER: I was going to tell him that I am going to seek legal counsel myself and straighten this, you know - -.

THE COURT: Couldn't you have done that by phone?

WIFE'S ANSWER: What do you mean?

THE COURT: Couldn't you have phoned Mr. Buckland and said I am not coming down to sign the papers, I am going to get a lawyer?

WIFE'S ANSWER: I thought I had to be there.

THE COURT: You thought you had to be there?

WIFE'S ANSWER: Yes.

THE COURT: To tell him that?

WIFE'S ANSWER: Yes - well I was going to go down and talk to him and explain to him.

THE COURT: And you didn't think you could make that explanation by telephone?

WIFE'S ANSWER: I didn't think of it at the time.

(R-177,R-178)

POINT II

WIFE HAS NO ABSOLUTE RIGHT TO CUSTODY OF MINORS UNDER TEN YEARS OF AGE.

The facts set forth in the record before the Court and which has been restated hereinabove, including the Answers of the wife to the Interrogatories of the Court, evidence that the wife filed a voluntary Consent and Waiver (R-6) as to the verified Complaint of the Appellant (R-1), and that a final Decree of Divorce was granted by the Honorable Ronald O. Hyde awarding custody of the minor children to the husband. (R-14, R-16)

The Honorable Calvin Gould in his Memorandum Decision found the children, who have been in the custody of the father since the original Decree of Divorce and are presently still in the custody of the father, to be "well adjusted" (R-68); that the mother in the husband's household is "a very loving person" (R-68); that the wife "did not sign her Stipulation under duress or coercion, that her signature thereon was a free and voluntary act" (emphasis added by Court) (R-69); that the Court found that the "parties are on an equal footing with respect to being able to care for the children". (R-69,-70)

The entire basis of the Court overruling the findings of the Honorable Ronald O. Hyde was on the basis that the Court

believed that "the mother being accorded the statutory presumption of a natural mother". (R-70)

In Johnson v. Johnson, 7 Ut.2d 263, 323 P.2d 16, Supreme Court of Utah (March, 1958), this Court held:

> That while the parents are entitled to some consideration, the paramount objective in such proceeding is not therapy for them, nor vindication of asserted parental rights, but is the welfare of the children.

In the Johnson case, the Court found that the Lower Court had found that both parents were fit to have custody of the children and that the children living with the father were well adjusted and happy, and that it was in their best interest and welfare to remain with the father subject to the wife's right to visitation and an Order was made accordingly. The appeal in the Johnson case, supra, was based upon a belief, that the wife alleged that Title 30-3-5, Utah Code Annotated, 1953, and upon Title 30-3-10, Utah Code Annotated, 1953, which specific section provides that:

> In any case of separation a husband and wife having minor children, the wife shall be entitled to the ** custody of all such children; (unless**).

This Court held that the language of Title 30-3-10 applies in cases of "separation" and is not binding in cases of divorce, and the Court referred to its prior adjudications in Walton v. Kaufman, 110 Ut. 1, 169 P.2d 97; Smith v. Smith,

1 Ut.2d 75, 262 P.2d 283, wherein the Court held that questions of custody are always equitable and that the controlling consideration is the welfare of the children involved.

POINT III

MODIFICATION OF DECREE OF COURT OF ORIGINAL JURISDICTION BY JUDGE OF CONCURRENT JURISDICTION CONSTITUTED AN URSURPATION OF THE SUPREME COURT'S APPELLATE JURISDICTION.

The failure of the pleadings of the wife in a Petition for Modification setting forth a substantial grounds of change of conditions as of the time of the award of the original Decree of Divorce by the Honorable Ronald O. Hyde in the Lower Court and the subsequent modification of the Decree by a Judge of concurrent jurisdiction in overruling the Decree of the Honorable Ronald O. Hyde awarding the children to the husband, and awarding the children to the wife constituted the invasion of the appellate power of the Supreme Court of the State of Utah by reversing the Judgment of the Honorable Ronald O. Hyde.

This Court previously held in Harward v. Harward, 526 P.2d 1183, Supreme Court of Utah (1974), the Order made by a Court is binding upon all of the parties unless and until they are reversed upon Appeal to the Supreme Court, and that a fellow Judge cannot set aside the Order of another Judge of concurrent jurisdiction.

In Peterson v. Peterson, 530 P.2d 821, Supreme Court of Utah, December, 1974, this Court held that an action by a Judge of concurrent jurisdiction, wherein one District Court Judge vacated the Order of his colleague, that such conduct cannot ordinarily be done, and specifically stated:

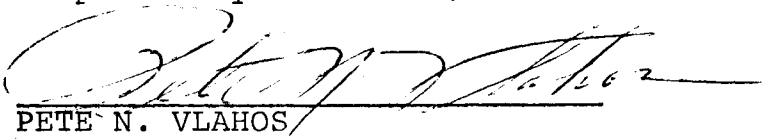
> To accomplish this feat would require such a procedure as appeal, or an unusual, independent procedure of some kind, - but not in virtue of the ordinary Motions, Orders to Show Cause, and the like, all of which leads us to the conclusion that the decision must then be reversed.

CONCLUSION

It is submitted to this Honorable Court, that the Decree by the Honorable Ronald O. Hyde was not subject to reversal when the pleadings and evidence presented by the wife seeking reversal of the Order of the Lower Court in a Court of concurrent jurisdiction could not properly plead nor evidence any change of conditions such as has been required by this Court for a change of custody of children and uprooting them from a place, as has been set forth hereinabove by the facts shown in evidence before the Court, that was a proper home with proper environment and a loving father who has remarried and who has a home conducive to the well being of the children and wherein they have been established for a long period of

time in a good and healthy environment, and that the burden of proof was upon the wife and there is no such strong presumption of preference of the wife over the husband in an action of divorce as can justify a Judge of concurrent jurisdiction overruling a previous Court of similar jurisdiction in changing the custody of the children.

Respectfully submitted,



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CERTIFICATE OF MAILING

A copy of the foregoing Brief of Appellant was posted in the U.S. mail postage prepaid and addressed to the Attorney for the Respondent, Russell J. Hadley, Esq., 70 East South Temple, P. O. Box 1765, Salt Lake City, Utah 84110, on this 30 day of September, 1976.

Jeannine Stowell, Secretary